Supreme Court, U. S.
FILED
SEP 29 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court

of the

United States

OCTOBER TERM, 1975

No. 75-20

ELIZABETH M. LEWIS,

Petitioner

vs.

TUCSON SCHOOL DISTRICT NO. 1, HONORABLE RICHARD N. ROYLSTON, as Judge of the Superior Court in and for the County of Pima, State of Arizona,

Respondents

Petitioner's Reply to Respondents' Brief in Opposition To a Writ of Certiorari to the Supreme Court of The State of Arizona

STANLEY G. FELDMAN
MILLER, PITT & FELDMAN, P.C.
111 South Church Avenue
Tucson, Arizona 85701

Attorneys for Petitioner

SUBJECT INDEX

Page

Qualifications for Retention 2

Petitioner Has Raised the Constitutional Issues in a Timely Manner 5

Petitioner is a State Employee 8

Supplemental Appendices

TABLE OF AUTHORITIES CITED

Cases — Page

Boykin v. Alabama, 395 U.S. 238 (1969) 5

Cincinnati Packet Co. v. Bay, 200 U.S. 179 (1905) 5

Koingsberg v. State Bar, 353 U.S. 252 (1957) 5

Smith v. Troyan, _____ F.2nd _____ (6th Civ. 1975) 7

Whitney v. California, 274 U.S. 357 (1927) 5

Statutes

Arizona Revised Statutes:

Title 15 (Education) 9
§ 15-111 9
§ 15-121 9
§ 15-231 *et. seq.* 9
§ 38-759 (H) (1973 Supplementary Pamphlet) 8
§ 38-741 *et. seq.* 9
§ 38-745 (A) 9

In the Supreme Court

of the

United States

OCTOBER TERM, 1975

No. .....

In the Supreme Court of the United States
In and for the District of Arizona

No. 75-20

ELIZABETH M. LEWIS,
Petitioner,

v.

TUCSON SCHOOL DISTRICT NO. 1, et al,
Respondents.

Petitioner's Reply to Respondents'
Brief in Opposition to a Writ of Certiorari

In its Brief in Opposition to the Petition for Writ of Certiorari, Respondent makes three points which were not discussed in Petitioner's Opening Brief.

I
QUALIFICATIONS FOR RETENTION

Respondent argues that there was nothing "unique" about Petitioner's ability and that Petitioner presented no proof of irreplaceability, nor any evidence that the students would be injured by having a different teacher. The relevancy of the test of uniqueness is difficult to ascertain, since neither Petitioner nor Respondent has ever claimed that such a standard would be proper. It may be that Respondent means that "unique" and "irreplaceability" and "injury to the students" are all synonymous. If so, it would be appropriate to consider Respondents' own evaluation of Petitioner's abilities.

Respondent never produced any evidence as to Petitioner's abilities, except some comments from Superintendent Dr. Lee. However, Dr. Lee admitted on deposition that he had no personal knowledge of Mrs. Lewis' abilities, had never seen her teach and could do no more than rely upon the evaulation of others. He admitted further that her principal's evaluation would be the best test of her abilities. Her principal, Mr. Clarence Logan, described her as:

> 1) "I consider Mrs. Elizabeth Lewis one of the finest teachers one could find anywhere. She is a truly professional teacher, and I highly recommend her request be granted." (Petition for a Writ of Certiorari, Appendix B, Page 12); and
>
> 2) "Mrs. Lewis is a rarity. She controls her classes well, really teaches students and is vital. Her students leave at the end of the year with a good knowledge of English." (Petitioner's Reply Brief, Supplemental Appendix B, Paragraph XVIII)

In addition the following factors indicated that Mrs. Lewis had abilities which were outstanding if not "unique":

1. Respondent School District's evaluation of Mrs. Lewis' ability as a teacher revealed that Mrs. Lewis was given the highest rating in the following areas:

A. cooperation
B. ability to express herself
C. English usage
D. tact and courtesy
E. punctuality
F. attendance
G. health and vitality
H. poise
I. ability to arouse pupil interest
J. affiliation with professional organizations
K. lesson planning
L. quality of classroom voice
M. participation in community activities
N. teaching techniques and skill
O. control of learning situation

2. She had been given an "average" rating in only one area, i.e., "attitude toward extra assignments," based upon the fact that she has already engaged in four extra-curricular activities (editor of the student literary magazine, sole supervisor of the student newspaper, head of the school's creative writing club and school's stock market club) and was not eager to accept more extra work.

3. According to Respondent School District's own evaluation, Petitioner's over-all rating as a teacher was "excellent".

4. Respondent Board stipulated that it "... had no evidence to contradict that the evidence offered by Mrs. Lewis in support of her physical and mental competence and her value to her former students."

(Petitioner's Reply Brief, Supplemental Appendix B, Paragraphs XVI, XVII, and XIX.)

It is true that Petitioner never presented evidence of "irreplaceability" or "injury to the students." There are two good reasons for this. First, although prior to the hearing before the Board Petitioner's counsel requested that he be informed of the standard could be produced, no such information was given Petitioner. As a result, evidence that was presented to the Board established those factors which are outlined above. It was only after the hearing that the Board decided that the standard was not competency or ability to perform the job, but rather "irreplaceability" and "injury to the students". It is surely not within principles of constitutional due process to reject Petitioner's application for failure to produce evidence to support a standard of retention which was not adopted until after the hearing at which Petitioner's request was rejected.

Secondly, and of equal importance, is the fact that the test of irreplaceability and injury to the students is in and of itself a deprivation of equal protection and due process of law for the simple reason that no one can meet such a standard. It is a violation of equal protection to require Petitioner to meet the standard of irreplaceability and injury to the students in order to be retained to the mandatory retirement age when no other state employee need meet such a standard and it is a denial of due process to require that an impossible standard for retention be met. This is an argument which Petitioner has made consistently in every judicial proceeding which has taken place since the time at which the School Board adopted that standard.

II

PETITIONER HAS RAISED THE CONSTITUTIONAL ISSUES IN A TIMELY MANNER

Respondent argues that the contentions made in Petitioner's Opening Brief were not raised below and were therefore waived and should not be considered in this Court. Interestingly enough, Respondent later admits that those issues were raised. It admits that they were decided (Page 5, Brief in Opposition to Petition for Writ of Certiorari) by the Arizona appellate court, but claims that the Arizona Court of Appeals was in error in deciding that the issues were properly raised from a procedural standpoint in Arizona. We submit that according to well-settled principles the procedure by which issues are raised in the state court is to be judged according to the state law. *Boykin v. Alabama,* 395 U.S. 238 (1969); *Konigsberg v. State Bar,* 353 U.S. 252 (1957), *Whitney v. California,* 274 U.S. 357 (1927); *Cincinnati Packet Co. v. Bay,* 200 U.S. 179 (1905).

Respondent argued below that Petitioner had adopted the wrong procedure, but the Arizona courts did not agree with Respondent's contention and did not dismiss the appeal. Instead, the very issues raised in Petitioner's Opening Brief in this Court were raised below, argued below and decided below. Respondent admits this, but now asks this court to revise Arizona appellate procedure.

The fact of the matter is simply that from the time at which she first learned the standard to be adopted was one of "irreplaceability" and "injury to the students" Petitioner has claimed that such an interpretation of the statute is deprivation of equal protection and due process of the law. Any confusion in determining when each issue was raised is perhaps due to the unusual course of this lawsuit through the judicial system of the State of Arizona. On June 6, 1973, Mrs. Lewis filed a special action against Respondent Tucson School District No. 1

requesting that said school district consider her application for retention in employment after she had attained the age of 65. The Court ordered Respondent to so consider her application application. After the Board had denied her application for retention on the ground that she was not "irreplaceable" and that failure to retain her would not be injurious to her students, Mrs. Lewis filed a Supplemental Complaint protesting the constitutional basis for the Board's decision. An Amended Supplemental Complaint was also filed, as was a Stipulation and Order (attached hereto as Supplemental Appendix "A") also entered whereby certain provisions of the Complaint were admitted and a number of items were admitted to evidence.

A Judgment was entered holding that the standard adopted by the School Board was neither arbitrary, capricious, nor an abuse of discretion under the due process clause, and that there had been no discrimination against the Plaintiff on the basis of age. Petitioner then filed a special action in the Court of Appeals for the State of Arizona (2CA-CIV 1660,) in addition to an appeal in that same court from the Superior Court decision (2CA-CIV 1698). (Portions of the records of both of these actions have been certified to this Court.) The Court of Appeals denied Petitioner's special action and she thereafter petitioned to the Supreme Court of Arizona on special action for extraordinary relief (Supplemental Appendix "B"). The Supreme Court of Arizona denied Mrs. Lewis any relief on her petition for special action, as did the Court of Appeals of the State of Arizona on her appeal from the same Superior Court decision. A motion for Rehearing (Supplemental Appendix "C") was filed with the Court of Appeals. Nevertheless, reconsideration was denied by that court, as was Review by the Arizona Supreme Court.

All issues raised in this Petition (and many which have been omitted) have been presented to the Arizona tribunal. Our

claim below and our claim here is simply and concisely this: We agree arguendo that the State may set compulsory retirement ages. The compulsory retirement ages for all State employees is 70 years. We agree, arguendo, that different compulsory retirement ages may be set for different job classifications. The equal protection clause does not require absolute uniformity but merely uniformity based upon relevant State interests. We would not argue that it would be improper to require retirement of policemen at the age of 60 despite the fact that judges are not required to retire until age 70 or age 80. This is of little help however to Respondent, for the simple reason that the State has not set a different compulsory retirement age for public school teachers than it has set for all other state employees, including teachers. It has set the age of 70 as retirement and has established a retention procedure applicable to all state employees. Again, differing standards may be set for differing categories of state employees depending upon the job. We will concede this arguendo. What we do not concede, however, is that the standard set for public school teachers may be one which is not rationally related to the state interests.

In other words, the State has argued consistently in this proceeding that the job of a public school teacher is more onerous than that of other state employees, and that it is essential therefore to determine that public school teachers applying for retention to age 70 have the ability to perform the job to which they will be assigned when retained. Once differing standards for retention are justified by that argument, it follows simply that it is unconstitutional and a deprivation of equal protection of the law to require Petitioner to show yet a different standard and one not connected to the legitimate state interest (injury to the students and irreplaceability) in order to be retained in her teaching position. See *Smith v. Troyan*, _____ F.2nd_____ (6th Civ. 1975) (reported in 44 U.S.L.W. 2050) (unconstitutional to have weight requirement for jobs as policeman when this requirement not reasonably

related to performance of position). We will concede arguendo that it is a permissible discrimination for the State to require Petitioner to show that she is fit for her job and able to perform its duties. She can make this showing. We have argued below and we argue now that it violates equal protection to justify unequal treatment on the grounds that the State must be assured of the applicant's ability to work and then to require that applicant not only show ability but also meet the additional and impossible burden of showing "irreplaceability" in order to retain her position.

III

PETITIONER IS A STATE EMPLOYEE

Having argued that Petitioner should be shown the door for having raised issues below is an untimely manner (even though the Court below disagreed with Respondent's contentions in that regard and even though such issues were raised, argued and decided below), Respondent then proceeds to argue an issue which has never before been mentioned in the entire sad history of this case. For the first time in its Brief to this Court, Respondent argues that school teachers are not employees of the State, but are only employees of the school district. Petitioner admits that the school district is an arm of the State, but contends that the school district may adopt different standards for its employees than are adopted for state employees. This argument comes too late.

Even if it is to be considered on the merits, we would respectfully point out that Respondent's own brief moots the issue of any distinction between "State employees" and "employees of political subdivisions" by citing *Ariz. Rev. Stat.* § 38-759 (H) (1973 Supplementary Pamphlet) which mandates a retirement age of 70 for both "state officers and employees" and "officers and employees of political subdivisions of the state."

Second, Petitioner has argued throughout that the class to which Mrs. Lewis belongs may be categorized as being all those persons who are members of Arizona's State Retirement System, *Ariz. Rev. Stat.* § 38-741 *et. seq.* A.R.S. § 38-745 (A) defines members of the Retirement System as both "employees and officers of the state" and "employees of political subdivisions." Subsection B of the same statute goes on to declare that employees of political subdivisions who are members of this fund are considered to be State employees. Thus, for purposes of employment and retirement benefits there is no distinction between Mrs. Lewis and any other state employee.

In addition, perusal of *Arizona Revised Statutes,* Title 15 (Education) reveals a statutory system in which all aspects of the professional life of a public school teacher are tightly regulated by the State. There is a State Department of Education (A.R.S. § 15-111) and State Superintendent of Public Instruction who has regulatory and disciplinary powers over all public school teachers within the State system (A.R.S. § 15-121, A.R.S. § 15-231 *et. seq.)* Thus, the standards and regulations regarding tenure, hiring, retention, retirement, receipt of employee benefits, etc., are statutorily decreed for all employees of the State school system. Respondent must ignore these relevant Arizona Statutes if it is to present an argument that Mrs. Lewis is not a State employee. This it cannot do.

RESPECTFULLY SUBMITTED this 25th day of September, 1975.

MILLER, PITT & FELDMAN, P.C.

BY STANLEY G. FELDMAN
111 South Church Avenue
Tucson, Arizona 85701

Attorneys for Petitioner

Supplemental Appendix A

In the Superior Court of the State of Arizona
In and for the County of Pima

No. 142783

ELIZABETH M. LEWIS,
Plaintiff,

v.

TUCSON SCHOOL DISTRICT NO. 1,
Defendant.

STIPULATION AND ORDER

The undersigned attorneys for the above named parties stipulate as follows:

(1) Plaintiff is granted leave to amend its Supplemental Complaint to add WARNER B. LEWIS, husband of plaintiff ELIZABETH LEWIS, as a proper party in interest pursuant to Rule 17(e), Arizona Rules of Civil Procedure, and the Supplemental Complaint is deemed so amended.

(2) The allegations of Paragraphs II, IV and V of Count Two of plaintiff's Supplemental Complaint are true.

(3) Letter dated November 5, 1973 from plaintiff's counsel to defendant's counsel is admitted in evidence as plaintiff's exhibit No. 1.

(4) Letter dated November 5, 1973 from Dr. Thomas Lee to plaintiff Mrs. Lewis is admitted in evidence as plaintiff's exhibit No. 2.

(5) Letter dated November 7, 1973 from William Brammer to Jeffrey Schwartz is admitted in evidence as plaintiff's exhibit No. 3.

(6) Letter dated November 8, 1973 from plaintiff's counsel to Dr. Lee is admitted in evidence as plaintiff's exhibit No. 4.

(7) Letter dated November 13, 1973 from Dr. Lee to counsel for plaintiff is admitted in evidence as plaintiff's exhibit No. 5.

(8) Transcription of informal hearing held on November 15, 1973 is admitted in evidence as plaintiff's exhibit No. 6.

(9) Material presented to the School Board by plaintiff on November 15, 1973 in black binder is admitted in evidence as plaintiff's exhibit No. 7.

(10) Letter dated November 20, 1973 from Jeffrey Schwartz to Dr. Lee and letter attached thereto from Olivia Bedford is admitted in evidence as plaintiff's exhibit No. 8.

(11) Letter dated December 14, 1973 from Dr. Thomas Lee to plaintiff Mrs. Lewis is admitted in evidence as plaintiff's exhibit No. 9.

(12) Letter dated December 27, 1973 from William Brammer to Jeffrey Schwartz together with enclosures is admitted in evidence as plaintiff's exhibit No. 10.

(13) Letter dated February 5, 1974 from William Brammer to Jeffrey Schwartz and enclosure thereto is admitted in evidence as plaintiff's exhibit No. 11.

(14) All testimony and documentary evidence admitted at the hearing on the Order to Show Cause, September 4, 1973, shall be considered a part of the record of this proceeding.

(15) The deposition of Dr. Lee taken on July 30, 1973 is admitted in evidence.

(16) The Board has no evidence to contradict the evidence offered by Mrs. Lewis in support of her physical and mental competence, and her value to her former students.

(17) Plaintiff will submit a trial memorandum in support of its Supplemental Complaint to the Court on or before February 11, 1974. Defendant will submit a response to plaintiff's trial memorandum to the Court on or before February 21, 1974. Plaintiff will file a reply to defendant's response on or before February 25, 1974.

(18) The Court will hear oral argument on February 25, 1974, at 11:00 o'clock, a.m., or as soon thereafter as counsel may be heard. Estimated time is one hour.

DATED this 8th day of February, 1974.

MILLER, PITT & FELDMAN, P.C.
Attorneys for Plaintiff

By /s/ JEFFREY H. SCHWARTZ
111 South Church Avenue
Tucson, Arizona 85701

DeCONCINI, McDONALD & BRAMMER, P.C.
Attorneys for Defendant

By /s/ WILLIAM BRAMMER
901 Lawyers Title Building
Tucson, Arizona 85701

ORDER

Pursuant to the foregoing Stipulation, and good cause appearing therefor,

IT IS HEREBY ORDERED that the above-stipulated items be approved and that the Court will hear oral argument on February 25, 1974 at the hour of 11:00 o'clock, a.m. for a period of one-half hour.

DONE IN OPEN COURT this 11th day of February, 1974.

/s/ RICHARD N. ROYLSTON
JUDGE OF THE SUPERIOR COURT

Supplemental Appendix B

In the Supreme Court
State of Arizona ,

No.

ELIZABETH M. LEWIS,

Petitioner,

vs.

TUCSON SCHOOL DISTRICT NO. 1; HONORABLE RICHARD N. ROYLSTON, as Judge of the Superior Court in and for the County of Pima, State of Arizona,

Respondents.

PETITION FOR EXTRAORDINARY RELIEF UNDER RULES PERTAINING TO SPECIAL ACTIONS

Petitioner alleges:

I

Petitioner is a resident of Pima County, Arizona, and at all times material to this action, Petitioner was a continuing teacher employed by Respondent Tucson School District No. 1.

II

Tucson School District No. 1 is a political subdivision of the State of Arizona.

III

Petitioner was a teacher in active service and a member of the State Employees' Retirement System pursuant to A.R.S. 15-1401, et seq.

IV

In the school year of 1972-73, Petitioner attained the age of 65 and made application to be retained in her position as a teacher in accordance with A.R.S. 15-1471.

V

A.R.S. 15-1471 provides as follows:

§ 15-1471.

Retirement of teacher members.

Any teacher in active service who becomes a member of the state employees' retirement system pursuant to the provisions of this article, shall be retired for service at the end of the school year following the date on which he attains the age of sixty-five, unless his employer approves and forwards annually to the state employees' retirement system board his application to be retained in his employment on a year-to-year basis. Teacher members in service shall be retired at the end of the school year following the date on which they attain the age of seventy, whether nor not they apply to be retained."

VI

Tucson School District No. 1 has provided forms adopting a procedure so that teachers who reach the age of 65 may make application to continue their employment.

VII

Petitioner made proper application for retention using the forms and following the procedure provided by Tucson School District No. 1. In September, 1972, Petitioner submitted the form entitled "Appeal for Continued Employment after 65." This form included her statement that:

> "I would like to continue work as a contract employee for the 1973-74 school year. I am in good health and will furnish doctors' statements to this effect if required."

Said form also included a recommendation from Mrs. Lewis' principal saying:

> "I consider Mrs. Lewis one of the finest teachers one could find anywhere. She is a truly professional teacher, and I highly recommend her request be granted."

VIII

At a meeting of the Tucson School District No. 1 Board on October 26, 1972, Mrs. Lewis' request was summarily denied. Respondent's policy is to deny routinely applications such as Petitioner's; since 1954 Respondent has approved no request and permitted no teacher to continue employment after age 65.

IX

On or about June 6, 1973, Petitioner commenced special action No. 142873 in the Superior Court of Pima County against Respondent Tucson School District No. 1. Pursuant to an order dated November 1, 1973 (a copy of which is incorporated herein by reference as Petitioner's Exhibit I), Respondent Honorable Richard N. Roylston ordered Respondent Board to meet and to consider Petitioner's application on its individual merits.

X

Pursuant to said order, and at the November 15, 1973 meeting, the Respondent Board received oral and written evidence from Petitioner in support of her application for continued employment (a copy of which is incorporated hereby by reference as Petitioner's Exhibit II).

XI

On December 18, 1973, Respondent Board, at its regularly scheduled meeting, announced its decision as follows:

> "The Board of Education has determined not to approve the request of Mrs. Elizabeth Lewis to teach during the 1973-74 school year following her sixty-fifth birthday. The Board does not question her physical and mental fitness. The Board's position is that A.R.S. 15-1406B provides for the retirement of a teacher 'at the end of the school year following the date on which he attains the age of sixty-five unless his employer approves and forwards to the board of trustees (of the retirement system) his application to be retained.' Under the provisions of this statute, the Board of Education may retain an employee on a year-by-year basis between the ages of sixty-five and seventy. If termination of the service of an employee would prove injurious to students, or if the employee would be difficult to replace, the Board of Education would be inclined to approve his request to continue employment. Since neither of these problems exist in this instance, due to the availability of many fine replacements in Mrs. Lewis' field of teaching, and since she could be and was replaced by a very able teacher, the Board of Education does not approve her request to continue."

XII

On January 9, 1974, Petitioner filed a Supplemental Complaint for Special Action, challenging Respondent Board's decision of December 18, 1973 (a copy of said Complaint is attached hereto as Petitioner's Exhibit III).

XIII

On March 26, 1974, the Honorable Richard N. Roylston entered an order finding the issues in favor of Respondent (a copy of said order is incorporated herein by reference as Petitioner's Exhibit IV). By said order, the Court below found:

> " . . . that the language of A.R.S. §15-1471 indicates that a teacher shall be retired at the end of the school year following the date on which the teacher attains the age of sixty-five (65), unless continued employment is approved by the employer. In no event may a teacher be employed for a school year past the year in which the teacher attains the age of seventy (70). However, the legislature did not set out a standard for the employer to follow in

determining whether to approve continued employment past age sixty-five (65). In such situations the Court will infer that a standard of reasonableness is to be applied.

"The Court further finds that Defendant has set as its standard one that calls for approval of continued employment past age sixty-five (65) if termination of the employee's services would prove injurious to students or if the employee would be difficult to replace. The Court finds this standard to be reasonable.

"The Court further finds that Plaintiff has now had her application considered on its own particular merits by the Defendant. The Defendant has exercised the discretion which it had a duty to exercise. The function of the Court in reviewing the decision of the Defendant is to determine whether or not the evidence presented to the Defendant sustains the decision of the Defendant, and not to hold a trial *de novo*. The Court finds that the evidence was sufficient to sustain the decision. The Defendant's determination was not arbitrary, not capricious, nor an abuse of discretion.

"The Court further finds that there was no deprivation by Defendant of Plaintiff's right to pursue a calling, or any invidious discrimination against Plaintiff on the basis of age."

XIV

Subsequent to the decision of Respondent Honorable Richard N. Roylston, Petitioner filed a Petition for Special Action in Division 2 of the Court of Appeals of Arizona; by order dated June 4, 1974, the Court of Appeals denied Petitioner's petition without written decision or comment.

XV

Petitioner has petitioned for rehearing before the Court of Appeals and brings this matter by special action and will further petition for review when and if the Court of Appeals rules on the Motion for Rehearing.

XVI

The evidence adduced at the hearing before the Respondent Board and submitted to the Respondent Court established without contradiction each of the following:

1. Mrs. Lewis taught English for students preparing for college.

2. Respondent School District's evaluation of Mrs. Lewis' ability as a teacher revealed that Mrs. Lewis was given the highest rating in the following areas:

a. Cooperation
b. Ability to express herself
c. English usage
d. Tact and courtesy
e. Pjnctuality
f. Attendance
g. Health and vitality
h. Poise
i. Ability to arouse pupil interest
j. Affiliation with professional organizations
k. Lesson planning
l. Quality of classroom voice
m. Participation in community activities
n. Teaching techniques and skill
o. Control of learning situation

3. She had been given an "average" rating in one one area, i.e., "attitude toward extra assignments," based upon the fact that she was already engaged in four extra-curricular activities (editor of the student literary magazine, sole supervisor of the student newspaper, head of the school's creative writing club and school's stock market club) and was not eager to accept more extra work.

XVII

According to Respondent School District's own evaluation, Petitioner's over-all rating as a teacher was "excellent."

XVIII

According to Respondent School District's own evaluation of whether Mrs. Lewis would be recommended for re-employment:

> "Mrs. Lewis is a rarity. She controls her classes well, really teaches students and is vital. Her students leave at the end of the year with a good knowledge of English."

XIX

Respondent Board stipulated that it " . . . had no evidence to contradict the evidence offered by Mrs. Lewis in support of her physical and mental competence and her value to her former students."

XX

In the school year 1970-71, at age 63, Mrs. Lewis was nominated for the Arizona award for outstanding teacher of the year.

XXI

All of the evidence presented to the Respondent Board and to Respondent Court indicated that Petitioner was exceptionally well qualified to continue teaching and was physically and mentally fit; there was no contrary evidence.

XXII

The proper interpretation of A.R.S. 15-1471 is that the Respondent Board has discretion to determine whether applicants for retention are qualified and physically and mentally fit to perform their jobs and follow their profession. Having determined that Petitioner was fit and qualified, it was an abuse of discretion for Respondent to refuse approval of her

application and to adopt a standard of irreplaceability as the test for approval of such applications; the Respondent Court abused its discretion and erred in affirming and sustaining the decision of the Board.

XXIII

All of the evidence supported the conclusion that the Petitioner was "one of the finest teachers" to be found "anywhere." There was no contrary evidence; there was no evidence that Petitioner could be replaced by anyone of equal experience and ability.

XXIV

Even if the standard of irreplaceability were the proper test, the Respondent Board's refusal to approve Petitioner's application was arbitrary, capricious and an abuse of discretion because all of the evidence established that Petitioner was "unique" and irreplaceable by any person of equal experience and competence. There was no evidence to the contrary.

XXV

The denial of Petitioner's application for retention was unsupported by any evidence that Petitioner lacked qualification or ability to perform her job and pursue her profession; such denial was also unsupported by any evidence that Petitioner could be replaced by a teacher whose qualifications and experience even approached those of Petitioner. Respondent Board's denial of Petitioner's application for retention was therefore an abuse of discretion; the affirmance of such denial by Respondent Court was also an abuse of discretion and was error.

XXVI

Under A.R.S. 38-759, all other employees, including teachers at institutions of higher learning, of the State and its political

subdivisions are not required to retire until age 70; under subsection (i) of said statute teachers at institutions of higher education may even continue teaching past age 70. Under the same subsection, other public employees may, under some circumstances, continue to work past age 70.

Respondent School District's denial of Petitioner's application for retention forced her retirement at age 65, despite her possession of all the professional, physical and mental qualifications for continued pursuit of her profession, while all other State employees may retire at age 70. Such forced retirement deprives Petitioner of her right to pursue employment and deprives her of the opportunity to build up retirement credits under the teachers' retirement credits until the age of 70, contrary to the right which all other public employees have to pursue their profession and increase their retirement security by working until age 70. Such forced retirement deprives Petitioner of equal protection of the laws, denies her due process of law and deprives her of the privileges and immunities of citizenship, all in violation of the Constitutions of the United States and of the State of Arizona.

XXVII

Petitioner has no plain, speedy or adequate remedy except by application for extraordinary relief because:

1. The matters with which this Petition is concerned relate to Petitioner's ability to earn a living; Petitioner is presently unemployed and, at age 65, can find no new work in her profession. She is without means of supporting herself and prompt remedy by special action is therefore appropriate.

2. Petitioner has stipulated with Respondent Board that if her petition is granted she will be paid back salary for the time during which she was prevented from teaching. Any accumulation of said back salary will constitute an expenditure of public funds for which no services were received by the School District; such an expenditure should be minimized.

3. The school year 1974-75 will commence in late August of 1974; even if Petitioner is correct in her legal position, she will be unable to obtain a teaching position unless her petition is acted upon at once.

4. This petition concerns matters of public interest and of constitutional law, which by tradition are promptly adjudicated by writ such as mandamus, certiorari or prohibition, all of which have now been replaced by "special action."

WHEREFORE, Petitioner prays this Court order Respondent Honorable Richard N. Roylston to order as follows:

1. That the standard of retention adopted by Respondent School Board and applied to Petitioner is legally erroneous, in that it violates both the intent of the statute and the due process and equal protection clauses of the Constitutions of the United States and of the State of Arizona.

2. That the decision of Respondent School Board is arbitrary, capricious and an abuse of discretion.

3. That Respondent Tucson School District No. 1 rescind its denial of Petitioner's application.

4. That Respondent School Board approve and forward Petitioner's application for retention to the State Employees' Retirement Board.

5. That Respondent School Board be ordered to tender Petitioner a contract to continue teaching in her present position for the school year 1974-75.

6. That Petitioner be awarded her costs expended herein and such other and further relief as is just and proper in the premises.

RESPECTFULLY SUBMITTED this 27th day of June, 1974.

MILLER, PITT & FELDMAN, P.C.

By /s/ STANLEY G. FELDMAN
111 South Church Avenue
Tucson, Arizona 85701
Attorneys for Petitioner

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

STANLEY G. FELDMAN, being first duly sworn, deposes and says: That he is the attorney for the Petitioner in the foregoing Petition; that he has prepared the foregoing and knows the contents thereof are true to the best of his knowledge and belief.

FURTHER your Affiant sayeth not.

/s/STANLEY G. FELDMAN

SUBSCRIBED AND SWORN TO before me this 27th day of May, 1974.

Notary Public

My Commission Expires:

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS

Mrs. Elizabeth Lewis, who is sixty-five years of age, is the petitioner. She has been a "continuing teacher" at Townsend Junior High School, a subdivision of Tucson School District No. 1, for fifteen successive years. She has been a teacher in active service for nearly forty years and a member of the State Employees' Retirement System pursuant to *A.R.S.* §15-1401, *et seq*. Her mental and physical fitness is not questioned, and her ability to perform successfully the responsibilities of her employment is uncontradicted.

In the school year in which she attained the age of sixty-five, petitioner properly made application to respondent School Board for renewal of her employment contract in accordance with *A.R.S.* §15-1471. The application was forwarded to respondent by her principal at Townsend Junior High School, Clarence Logan, who highly recommended that petitioner's application be approved. Though the Board has provided forms since 1954 adopting a procedure so that teachers aged sixty-five may continue to teach, respondent has summarily denied all such applications for retention. This refusal to approve applications is based on respondent's long-standing unwritten policy to deny re-employment to teachers who attain the age of sixty-five with the possible exception of those who can prove they are unique and irreplaceable. No teacher aged sixty-five has yet come within this exception to the Board's satisfaction.

At the regularly scheduled meeting of the School Board on October 26, 1972, Dr. Lee, Superintendent of Schools, recommended disapproval and petitioner's application was routinely denied by the Board. Mrs. Lewis had asked for, but was not given notice of, the meeting; nor was she given an opportunity to support her application with evidence as to her qualifications and fitness for employment. Petitioner's application was not considered on its own individual merits. Principal Logan's approval was disregarded. Petitioner was given no reason for the denial, except that one of the board members informally wrote to petitioner in explanation: "It would be unfair to hire you when all other applications have been denied."

On June 5, 1973, petitioner brought a special action attacking the Board's abuse of discretion in failing to approve her application for continued employment and challenging the Board's arbitrary and discriminatory policy of refusing employment to teachers who reach the age of sixty-five as a

denial of due process and equal protection arising under the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of Arizona. The court below, the Honorable Richard N. Roylston presiding, ruled that as a continuing teacher, petitioner had a right to have her application individually considered on its own particular merits and ordered respondent to so consider petitioner's application. The ruling made it unnecessary for the court below to decide the various substantive and procedural violations alleged by petitioner. Subsequent events, however, rekindled these allegations and independently provoked new constitutional issues which were brought before the same court below in petitioner's supplemental special action. These most recent events may be recited briefly.

On November 5, 1973, the Board met in closed, informal session with petitioner and her attorney. Respondent accepted oral and written evidence from petitioner concerning her qualifications to continue teaching beyond the age of sixty-five, but refused to give petitioner any indication of the policy standards against which her application would be measured. Within the time allotted and considering the absence of any employment guidelines, petitioner submitted all the evidence she could muster in her own behalf. The evidence quite clearly showed the following:

(1) Petitioner was physically and mentally fit and competent to continue teaching.

(2) Petitioner had a distinguished educational background which included over 39 years of dedicated service to her students as an employee of Tucson School District No. 1.

(3) Petitioner had received in prior years voluminous unsolicited letters of recommendation from students and parents commending her teaching abilities.

(4) Petitioner had won the respect of students, parents and teachers and had an established reputation in the community as an excellent teacher.

(5) Petitioner's principal, Clarence Logan, who evaluated petitioner's teaching abilities on June 8, 1973, in the course of his regular duties, gave petitioner an "Excellent" on her overall-rating and commented: "**Mrs. Lewis is a rarity.**"

(6) Principal Logan on or about October 22, 1972, forwarded petitioner's appeal for continued employment after age sixty-five to respondent and made the following recommendation: "I consider Mrs. Elizabeth Lewis one of the finest teachers one could find anywhere. She is a truly professional teacher, and I highly recommend her request be granted."

(7) Petitioner was nominated in 1973 for the "Best Teacher in Arizona" Award.

(8) Petitioner's students have continuously won first prizes in local and state spelling and essay contests.

(9) Petitioner had made a variety of extracurricular contributions to her school as supervisor of the student's literary magazine, newspaper, creative writing and stock market clubs.

(10) Petitioner has not missed one day of school attendance in the last three years on account of health.

(11) The failure to rehire petitioner deprived students, parents and the community of a truly professional teacher.

Despite the testimony which established that petitioner is fully endowed with those teaching qualifications and characteristics of excellence which set her apart from other teachers and make her difficult to replace, on December 18, 1973, the Board again refused to approve petitioner's application. The reason given for the denial was that the termination of Mrs. Lewis' contract would not prove injurious to students nor would petitioner be difficult to replace.

The court below declined to grant petitioner the relief she requested. Petitioner comes to this court by way of special

action so that the case may be resolved before the commencement of the 1974-1975 school year.

PETITIONER'S THEORY OF THE CASE

Upon stipulation of facts to the court below, petitioner's supplemental complaint and trial memorandum set forth three primary grounds for reversing the Board's decision. First, the Board's decision to refuse employment to petitioner was a manifest abuse of discretion. In the absence of any specific written guidelines used by the Board to assess petitioner's application, the evidence she submitted concerning her qualifications, together with her principal's unqualified approval, could not fail to convince a reasonable Board that her services could not easily be duplicated and that her application merited approval and acceptance. After an individual consideration of petitioner's qualifications, the Board has no evidence to warrant overruling Principal Logan's recommendation. Respondent's failure to approve and accept petitioner's application was a patent abuse of the evidence.

Second, respondent's policy of refusing employment to teachers on the basis of their age except when they are unique or irreplaceable contravenes the legislative intention of *A.R.S.* § 15-1471. In the absence of any express standard of retention set forth in the statute, a standard of reasonableness is to be inferred. The Board's standard is obviously unreasonable and arbitrarily imposes a burden on applicants sixty-five years of age which cannot be reasonably inferred from the Teacher's Retirement Act. Furthermore, the unwritten policy adopted by respondent and applied to petitioner was so vague and illusory as to violate petitioner's right to due process of law.

Finally, the arbitrary refusal to permit petitioner to continue teaching underscores a vexing pattern of discrimination which has effectively decimated the ranks of veteran teachers whose

credentials are equally impressive, if not more impressive, than those applicants hired by the Board as replacements. In addition, respondent has deprived petitioner, who can successfully fulfill her contract, of the privilege and right to pursue public employment and her chosen profession in derogation of her privilege of citizenship as guaranteed by the Federal and State Constitutions. This discrimination and deprivation, taken together, is not justified by any educational purpose rationally related to the Board's decision. Accordingly, the Board's policy, measured against either the strict scrutiny or the rational relationship test, denied petitioner equal protection under the law.

ARGUMENT I

A. The Plain Meaning of A.R.S. § 15-1471.

Arizona has adopted a special policy towards teachers after they attain the age of sixty-five and before they reach the age of seventy. Before a teacher reaches the age of sixty-five, his contract of employment is automatically renewed for the next ensuing school year unless there is good cause for dismissal or termination. *A.R.S.* §§ Nos. 15-252 and 253. After a teacher reaches the age of seventy, he is required to retire whether or not he applies for retention of his employment. *A.R.S.* § No. 15-1471. For the teachers between the age of sixty-five and seventy, however, there is neither a statutory provision affording a teacher the right to have their contract automatically renewed nor a provision which makes sixty-five the age of compulsory retirement regardless of whether the teacher applies to be retained. The Arizona Teacher's Tenure Act and Teachers' Retirement Act thus evince a clear legislative intent that teachers between the age of sixty-five and seventy be treated differently from teachers not yet sixty-five or over seventy.

With respect to the employment of teachers who have attained the age of sixty-five but not seventy, *A.R.S.* §15-1471 provides:

> "Any teacher in active service who becomes a member of the State Employees' Retirement System pursuant to the provisions of this Article, shall be retired from service at the end of the school year following the date on which he attains the age of sixty-five, *unless his employer approves and forwards annually to the State Employees' Retirement System Board his application to be retained in his employment on a year-to-year basis."* (Emphasis supplied) (The same provision is contained in *A.R.S.* §15-1406 B).

This provision grants a teacher who has attained the age of sixty-five the statutory right to make an application for continuation of his employment. It further provides that any teacher in active service has the right to continue his employment on a year-to-year basis until he attains the age of seventy if his application for retention of employment is approved by his employer on a year-to-year basis. Once the condition of employer approval is satisfied in any given year, a teacher between the age of sixty-five and seventy may not be deprived of his statutory right to continue employment during that year.

Furthermore, *A.R.S.* §15-1471 on its face does not state a preference for forced retirement as distinguished from continued teaching. The statute plainly interpreted holds that a teacher must retire if respondent refuses to grant the approval and shall continue to teach if respondent does give its approval. The statute is silent, however, as to the standard respondent is required to use in determining whether or not to approve or disapprove applications for retention.

B. A.R.S. §15-1471 as Construed.

There are three sources which further construe *A.R.S.* §15-1471. First, A.R.S. §15-1471 is part of the *Arizona*

Thus, the Attorney General held that tenured teacher's contracts must be treated as personal service contracts. Their approval or disapproval by respondent must be made taking into consideration the individual merits and personal services that can be offered by each particular applicant.

Third, the court below, after a deliberate evaluation of *A.R.S.* §15-1471, held that the statute requires the Board to consider each application on its individual merits. The court also held that the statute makes retirement discretionary at age sixty-five and mandatory at age seventy. Furthermore, Judge

Teachers Retirement Act. A.R.S. §§15-1401, *et seq*. Arizona has taken the position that the purpose of the Teachers Retirement Act is to reward teachers for past and *future service. Montgomery v. Crawford*, 70 Ariz. 359, 220 P.2d 853 (1950) (emphasis supplied). Moreover, *Montgomery, supra*, held there was no authority under the Teachers Retirement Act for the Board to establish membership requirements for teachers joining the system that were not to be found in the Act by express words or reasonable implication.

Second, *A.R.S.* §15-1471 has been construed by *Opinion No. 56-121* of the Attorney General of Arizona. This interpretation of *A.R.S.* §15-1471 also is supported by the plain language and meaning of the statute. In construing *A.R.S.* §15-1406(b), which directly parallels and in no material way differs from *A.R.S.* §15-1471, it was concluded:

> "This section gives to each member in service the 'right' to make an application to be retained after he reaches the age of sixty-five. *This 'right' carries with it the right of each applicant to have his application individually considered on its own particular merits* by the Board of Trustees or the Board of Education of his school district before it is approved or denied. Any standard of retention that takes away this right would be violative of the legislative intent." 42 *Am.Jur.*, Public Administrative Law, §53. (Emphasis supplied.)

Roylston ruled that the legislature did not set out a standard in *A.R.S.* §15-1471 for the employer to follow in determining whether to approve continued employment past age sixty-five. Judge Roylston ruled: "In such situations the Court will infer that a standard of reasonableness is to be applied."

C. Respondent's Interpretation of A.R.S. §15-1471.

Respondent interprets *A.R.S.* §15-1471 to state a preference for forced retirement at age sixty-five. Retention is to occur only upon the approval of the employer, which is a purely discretionary matter. Furthermore, respondent says that A.R.S. §15-1471 does not require the Board to write down its standard of retention and give an applicant prior written notice of the guidelines to be used in assessing an applicant's qualifications.

However, respondent arguably did give petitioner some indication of the standard to be applied in Dr. Lee's deposition. He said that there is no formal standard, and that the decision is invariably a subjective matter; but he would not be inclined to recommend approval unless the applicant was unique or irreplaceable. He further stated that only one out of a thousand is unique or irreplaceable in his opinion.

Softening this position somewhat, the Board stated its interpretation of *A.R.S.* §15-1471 in its reason for rejecting petitioner's application: No teacher sixty-five years of age may continue teaching unless he establishes that termination of his services would prove injurious to students, or that he would be difficult to replace. Thus, it would appear an application for continued retention must show some irreparable damage to the students or that his personal services cannot easily be duplicated.

Yet, underneath this verbiage, the standard actually used by the Board is self-evident. The Board will not approve an

application unless it wants to do so or feels the need to do so. This is an illusory standard, which can be be manipulated by the Board in an unrestrained and unfettered manner to fashion the result it desires. There is nothing objective about the standard since there is absolutely no way of knowing in advance what evidence satisfies the standard. In the absence of any guidelines, the Board can retain whomever it pleases.

D. Petitioner's Interpretation of A.R.S. §15-1471.

Petitioner argues that the school board may not refuse to rehire a sixty-five-year-old teacher who is mentally and physically fit to continue teaching, who properly makes application to continue teaching, and who can successfully perform the responsibilities of her employment. The standard reasonably to be inferred from *A.R.S.* §15-1471 is one of "fitness" or "suitability" to perform the job.

A.R.S. §15-1471 makes age seventy the mandatory age for retirement in Arizona. Teachers who are sixty-five but not yet seventy are permitted by the Arizona Teachers Retirement Act to retire and receive retirement, pension and other benefits if they so desire. But they are not forbidden from continuing any further teaching. They have the option to continue teaching each year until the year of their seventieth birthday with their employer's approval. *Cf. Finch v. State Dept. of Public Welfare*, 80 Ariz. 226 295 P.2d 846 (1956).

The clear intention of the Arizona Teachers Retirement Act is to reward continuing teachers who attain the age of sixty-five by providing for their retirement if they choose to retire. But *A.R.S.* §15-1471 also expressly grants active members in service the right to continue teaching, assuming the teacher is fit and qualified to hold the job. Petitioner was a continuing teacher even before the Arizona Teachers Retirement Act was enacted. Her continuing record shows special fitness to continue her employment. No common sense interpretation of *A.R.S.*

§15-1471 requires the position that petitioner must retire and that the Board can unreasonably withhold its consent to permit petitioner to continue her employment.

Respondent takes the position that it has unrestrained power to determine who may and may not continue teaching. This is not the intent of the Teachers Retirement Act. In *Montgomery, supra,* at 70 Ariz. 359, the Supreme Court of Arizona interpreted the Act:

> "It would appear that the board is vested with broad administrative powers to be exercised in accordance with a sound discretion and with a view to effectuating the purpose of the act, and its determination within its discretionary field cannot be questioned except for a clear abuse or a clear violation of the law. *But the grant of broad administrative powers does not carry with it the right or authority to establish membership requirements that are not to be found in the statute by express words or reasonable implication."* (Emphasis supplied.)

Petitioner does not serious contend that *A.R.S.* §15-1471 is void on its face or amounts to an unauthorized delegation of legislative authority to respondent because this statute does not contain an express statement to guide the exercise of respondent's discretion.

> "Where it is impracticable to lay down a definite comprehensive rule, such as where the regulation turns upon the question of persons futures, . . . it is not essential that a specific prescribed standard be expressly stated in the legislation. *In such situations the court will infer that the standard of reasonableness is to be applied."* 1 *Am.Jur. 2d, Administrative Law,* §117. (Emphasis supplied.)
>
> "Where an ordinance in terms merely says that a certain thing shall not be done without a permit from a designated officer, it is often interpreted as meaning that the officer is to grant the permit unless, in his honest judgment reasonably exercised, the interest of the public will thereby be put in jeopardy, a construction rendering it unobjectionable on constitutional grounds." *New York ex rel. Lieberman v. Van de Carr,* 199 U.S. 552, 50 L.Ed 305, 26 S.Ct. 144; *Cities Service Oil Co. v. Marysville,* 117 Kan. 514, 231 P. 1031, 43 A.L.R. 854, error dismd 270 U.S. 665, 70 L.Ed 788, 46 S.Ct. 207; *Ex parte Broussard,* 74 Tex. Crim 333, 169 S.W. 660, error dismd 241 U.S. 693, 60 L.Ed 1215, 36 S.Ct. 285.

Petitioner does not seriously contend that *A.R.S.* §15-1471 is standard requiring petitioner to demonstrate irreparable injury is unreasonable as a matter of law. What is reasonably implied from the statute in question is that the respondent is to give his approval to the applicant, unless, in his honest judgment reasonably exercised, the applicant is unfit or unsuitable to continue teaching or that the school children would thereby be put in jeopardy. When the uncontradicted evidence shows that the applicant is qualified and can successfully perform the job, the refusal to rehire is unreasonable and arbitrary. The standards imposed by the School Board simply have no manifest relationship to the employment in question. The Board may not make use of its power as a subterfuge to avoid the Teachers Retirement Act by setting standards of retention which are so burdensome and inappropriate as to force retirement. *Cf.* Board of Education, *Tucson H.S. District No. 1 v. Williams,* 1 Ariz.App. 389, 404 p.2d 324 (1965)

The school board's interest in guaranteeing that teachers age sixty-five are fit to continue their teaching duties simply does not justify the imposition of a standard of irreparable injury. It is patently unnecessary. Respondent concedes that petitioner is mentally and physically fit to continue teaching and can satisfactorily perform her occupation as a teacher. To require more than this is simply in derogation of the standard reasonably to be imposed from the statutes in question.

II

RESPONDENT DISREGARDED THE EVIDENCE

Of all the facts submitted by petitioner both to the Board and the court below, one stands out from all the rest. As Dr. Lee admitted in his deposition, which was made part of the record by stipulation, the evaluation by Principal Logan of Mrs. Lewis' ability as a teacher "is the best evaluation and record of her performance as a teacher." Dr. Lee admitted that "Mr. Logan would know more than anyone else." *Deposition* of Dr. Lee at 31-32. Looking at Mr. Logan's evaluation it reveals that Mrs. Lewis was given the highest rating in the following areas:

(1) Cooperation.
(2) Ability to express herself.
(3) English usage.
(4) Tact and Courtesy.
(5) Punctuality.
(6) Attendance.
(7) Health and Vitality.
(8) Poise.
(9) Ability to arouse pupil interest.
(10) Affiliation with professional organizations.
(11) Lesson planning.
(12) Quality of classroom voice.
(13) Participation in community activities.
(14) Teaching techniques and skill.
(15) Control of learning situation.

She received a rating of "good" in the following areas:

(1) Personal appearance.
(2) Understanding of children.
(3) Acceptance of and willingness to profit from criticism.
(4) Parent relationships.
(5) Classroom housekeeping.
(6) Record keeping.

The only area in which she was given an "average" rating was her "attitude toward extra assignments." This is not an unreasonable rating, considering that Mrs. Lewis served four extracurricular clubs: She was editor of the student literary magazine, sole supervisor of the student newspaper, and head of the creative writing club and stock market club.

According to Principal Logan's evaluation, petitioner's overall rating was "Excellent." Finally, in response to the question, "Would you recommend for re-employment," which Principal Logan checked, he made the following comment:

> *"Mrs. Lewis is a rarity*. She controls her classes well, really teaches students, and is vital. Her students leave at the end of the year with a good knowledge of English." Plaintiff's Exhibit C, Deposition of Dr. Lee.

This evidence was not left uncorroborated. The evidence of two of Mrs. Lewis' students at trial, the voluminous evidence from former students, teachers and parents produced a clear, convincing and univocal conclusion which no reasonable person could refuse to admit -- Mrs. Lewis is a rarity. In fact, respondent Board stipulated that "The Board had no evidence to contradict the evidence offered by Mrs. Lewis in support of her physical and mental competence, and her value to her former students."

The only evidence produced by respondent was that there were numerous applications by teachers not yet sixty-five who were seeking employment by Tucson School District No. 1. Though all these teachers could obviously teach English, there was no evidence that these applicants had qualifications equally impressive as petitioner's.

It is elementary that the decision of the Board is reviewable for abuse of discretion if the decision was not based upon substantial evidence or was an arbitrary, capricious and unreasonable result. Rule 3, *Arizona Rules of Procedure for Special Actions.* Respondent produced no evidence that the loss of petitioner's services would cause less than injurious consequences to the students. Moreover, though having

considered the uncontradicted evidence presented by petitioner, the Board completely disregarded the overwhelming evidence which proved beyond any reasonable doubt that Mrs. Lewis is a teacher who cannot be ranked along with other teachers because of her truly professional ability and unlimited experience. In the face of all this, the decision of the School Board can be explained only by their adamant refusal not to permit anyone who is sixty-five years of age or older to teach. The School Board therefore abused its discretion by disregarding the overwhelming weight of the evidence, by overruling the recommendation of Principal Logan whose evaluation of petitioner is concededly the best evidence, and by reaching a result which is inconsistent with the evidence.

III

THE DENIAL OF PETITIONER'S APPLICATION VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS

A.R.S. §15-1471, as interpreted by the Respondents, enables the employer to force teachers to retire at age sixty-five. Under *A.R.S.* §38-759, all other public employees may work until seventy. They cannot be forced to retire before then. *Finch v. State Department of Public Welfare*, 80 Ariz. 226, 295 P. 2d 846 (1956).

Forced retirement at age sixty-five is detrimental to petitioner and others in her class in both a pecuniary and non-pecuniary manner. First, she is deprived of her right to pursue a calling or profession, thereby to work and to sustain herself. *York v. State*, 498 P.2d 644 (Hawaii, 1972).

Secondly and more specifically, by being required to retire at age sixty-five, when no other public employees can be compelled to retire until the age of seventy, petitioner is

deprived of the opportunity to earn additional retirement credits between the ages of sixty-five and seventy and thereby further her retirement security. Such inequality of retirement between for example, a high school teacher and a teacher at a junior college, a ninth grade English teacher and a juvenile probation officer, has no constitutionally permissible basis and violates the equal protection clause. *Nelson v. Miwa*, Hawaii Circuit Court, opinion attached.

There is no rational reason to require public school teachers in Tucson School District No. 1 to retire at age sixty-five and to permit other public employees and especially teachers beyond the age of sixty-five to continue working in equally important positions: even if lines must be drawn, they may not be demarcated at a point which arbitrarily discriminates against the class of teachers of which petitioner is a member. See *Murgia v. Massachusetts Board of Retirement*, 42 U.S.L.W. 2640 (June 18, 1974) (D.C. Mass.) (copy attached).

DATED this 27th day of June, 1974.

MILLER, PITT & FELDMAN, P.C.

BY /s/ STANLEY G. FELDMAN
111 South Church Avenue
Tucson, Arizona 85701

Attorneys for Petitioner

In the Court of Appeals
State of Arizona
Division Two
No. 2 CA-CIV 1698

ELIZABETH M. LEWIS,
Appellant,
vs.
TUCSON SCHOOL DISTRICT NO. 1,
Appellee.

MOTION FOR REHEARING

Appellant moves this Court to rehear the issues presented by this appeal and to reconsider its opinion in this matter. Appellant takes no issue with the principles upon which the opinion of this Court is based. In essence, this Court's opinion holds persuasively that a state has a rational basis for setting different retirement ages for elementary and secondary school teachers than the retirement ages applied to other state employees. *Arguendo*, this Appellant need not argue with that holding.

However, the problem is that the issue of fundamental constitutional law which Appellant advanced in this case goes beyond a mere holding that the state may set different retirement ages for different types of employees. As Appellant indicated during oral argument, this is *not* a mandatory retirement age case; it is a retention case. It is a case questioning the validity of different standards for retention and continuance in employment after retirement age has been reached. Appellant

claims that it violates the constitutional requirement of equal protection of the law to condition the continuation of Mrs. Lewis' employment beyond the age of 65 upon proof of "irreparable injury" when other state employees only have to show "valuable service" or "special fitness" in order to obtain their employers' approval to continue working past the mandatory retirement age.

A.R.S. §15-1471 holds out the promise to all public school employees that they may continue teaching. This is a promise also held out to employees of institutions under the control of the Arizona Board of Regents. A.R.S. §39-759(I) Furthermore, a new statutory system, effective July 1, 1975, permits every other state employee to continue employment after retirement age if "specially fitted" by training to perform the duties of his position. A.R.S. §38-759.01(B)

Tucson School District No. 1, however, has adopted a standard of retention which makes it so difficult to obtain permission to continue teaching that the effect has been to deny public school teachers a right which is granted to other state employees. In sharp contrast to the standard of "valuable" service and "special fitness" applied to other state employees, Tucson School District No. 1 has interpreted the statute and given to it the meaning that retention will not be allowed unless termination of the applicant's employment would be "injurious to students" or the employee would be "difficult to replace." This Court's decision affirms that interpretation of the statute. Not only is this standard incapable of objective ascertainment, but it creates special hardships on Appellant and others in her position. The retention statute applicable to Appellant (A.R.S. §15-1471) sets no standard for retention and the standard adopted for this statute by School District No. 1 is the point in issue in this case. In other words, there being no standard for retention in the statute, Appellant concedes that she could not

complain if the same retention standard were read into the statute in question as exists for the other statutes, that is, if Appellant could be retained in her job if she were "specially fitted" or could "perform valuable service." The statute in question is unconstitutional when applied to Appellant because the standard read into it by the Appellee school district and approved by this Court treats Appellant differently from any other classification of state employee and does so without any rational basis whatsoever.

The School Board has, therefore, effectively eliminated a right which every other state employee has: the right to continue working for so long as the employee can continue to meet a reasonable standard of retention which, in the case of every other employee, is related to his ability to perform his job.

If the state of Arizona holds out to its employees the statutory promise of continued employment beyond mandatory retirement, that promise cannot be hedged about with restrictions which destroy the right. This position was convincingly reiterated by the United States Supreme Court in *Goss v. Lopez*, 43 U.S.L.W. 4181 (January 21, 1975), in which the Court held that the suspension of public school students without a hearing violated the Fourteenth Amendment. The Court founded its decision on the principle that once a statutory right is created, a state administrative agency cannot abridge that right without according the beneficiaries due process and equal protection under the law. Thus the Court stated:

> "Accordingly, a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process. *Connell v. Higginbotham*, 403 U.S. 207 (1971); *Weiman v. Updegraff*, 344 U.S. 183, 191-192 (1952); *Arnett v. Kennedy*, 416 U.S. 134 (1974), 164 (Powell, J., concurring); 171 (White, J., concurring and dissenting). So may welfare recipients who have statutory rights to welfare as long as they maintain the specified qualifications. *Goldberg v. Kelly*, 397 U.S. 254 (1970). *Morrissey v. Brewer*, 408 U.S. 471 (1972), applied the limitations of the Due Process Clause to governmental decisions to revoke parole, although a parolee has no constitutional right to that status. In like vein was *Wolff v. McDonald*, 418 U.S. 539 (1974), where the procedural protections of the Due Process Clause were triggered by official cancellation of a prisoner's good-time credits accumulated under state law, although those benefits were not mandated by the Constitution."

In the same vein, on the basis of Arizona law, Mrs. Lewis plainly had a legitimate claim of entitlement to continue teaching. Having chosen to extend the right to continue working to all state employees generally, Arizona may not restrict that right by setting a standard so different from every other standard applied to state employees as to withdraw that right or to make it impossible to continue working. *Goss, supra.*

This principle was also expressed in *Application of Levine*, 97 Ariz. 88, 90-91, 397 P.2d 205 (1964), where the Court stated:

> "The right to practice law is neither greater nor less than the right to engage in other occupations, businesses or trades, for the right to seek *and retain* [emphasis added] employment is shared by all equally and to be equal must be upon the same conditions. It cannot be treated as a matter of grace or favor . . . ."

Thus, in the final analysis, Appellant's contention is simply that it is invidious discrimination and a violation of the equal protection clause to require her to meet a virtually impossible standard in order to be retained in her employment while all other employees who are covered by the State Retirement Fund need meet only a reasonable standard connected to their

employment. This difference is not merely academic in the case at bar since Appellant's experience and professional qualifications and accomplishments are such that she can meet any reasonable standard.

The evidence established without exception that Appellant at age 65 is one of the outstanding English teachers in the state. Thus, she is capable of rendering "valuable service" and has a "special fitness." To meet the standard adopted by Appellee, however, Appellant must prove irreparable injury to her students and irreplaceability. Such proof is beyond Appellant's power, and indeed probably beyond the power of any individual within the State Retirement Fund.

Appellee school district argues that the nature of the job requirements for elementary and secondary school teachers are different from those of other employees covered by the state retirement system and therefore might reasonably justify a difference in treatment. This may be true; but while there might be a rational basis for setting a different retirement age, there is no rational basis for setting different standards for retention, *unless* those differing standards for retention have some rational connection to job requirements. However, subsumed within the standards of "valuable service" and "special fitness" are all items of fitness and competence which each employee must show to be retained in his individual position.

The standard of "special fitness" takes into account that there may be considerable variation in the responsibilities and duties of each employee and requires each employee to demonstrate that he is "specially fitted" to continue to carry out those responsibilities. Thus, the standard of "special fitness" takes into consideration the possibility that it may be harder to be a junior high teacher than a janitor, or a truck driver, or a college professor.

Assuming that teaching elementary and secondary school children is harder than teaching juvenile offenders, juvenile delinquents, deaf and blind students, mentally retarded students, state prison inmates and the like, it is rational to suppose that the legislature might be serving a legitimate state interest by requiring the applicants for retention in the position of elementary or secondary school teachers be competent or specially fitted to perform their jobs. Here again, however, although we concede for purposes of argument that the legislature might constitutionally make that type of requirement applicable to applicants for retention in the position of secondary or elementary school teachers, the statute as interpreted does not require that sort of special showing by Appellant. It requires, as interpreted, a showing that it would be injurious to her students or that she would be difficult to replace if she were not retained. No other state employee must show that his retirement would be injurious to his employer or the people whom he serves.

There is no rational basis for setting not only a different retirement age but a different standard for retention, since all other standards used by the state and applied to other state employees could effectively serve the state's purpose in insuring its educators remain at top level of competence. The cases cited in the Court's opinion which permit earlier retirement ages for some professions or occupations do so on the theory that an arbitrary line must be drawn somewhere, and more demanding occupations require earlier review of whether the line of competence has been reached. In oral argument, Appellant admitted *arguendo* that the state had a right to set an earlier retirement age for different occupations, but argued then, and argues now, that the state does not have the right to set different standards for retention unless those standards of retention bear some reasonable relationship to the legitimate

interest of the state to insure competence in its employees. Difficulty of replacement and injury to students have no relationship to competence or special fitness, and not only require that Appellant meet a standard for retention which no other employee in the state need meet, but also require Appellant to make a showing which is a virtual impossibility.

Appellant also submits that although Appellee school district has presented an arguable basis for setting forth different retirement ages for elementary and secondary instructors in county school districts as opposed to university educators and other types of state employees who are covered by the State Retirement Fund, it has presented no rational basis by which the state could permit elementary and secondary teachers who teach in deaf and blind institutions, juvenile corrections institutions and the like, to teach for five years longer than teachers employed by county school districts. The only argument advanced by Appellee is that the duties of an elementary or secondary school educator demand more endurance, alertness and self-control than those in other professions. This makes no sense when compared to such teachers employed by institutions involving education and training of the physically or mentally handicapped, the emotionally retarded, emotionally disturbed, etc. The problems faced by elementary and secondary school teachers in such institutions are certainly as great, if not greater, than those faced in a regular public school.

We submit that when viewed in this light, the "rational basis" hinted at by Appellee and implicitly approved by this Court in its opinion, is not truly rational. Appellee has neither presented nor alluded to any other rational explanation for permitting different mandatory retirement ages or retention

standards to exist. For this reason, Appellant moves this Court to rehear her cause and reverse its earlier holding.

DATED this 13th day of February, 1975.

MILLER, PITT & FELDMAN, P.C.

/s/ STANLEY G. FELDMAN
111 South Church Avenue
Tucson, Arizona 85701
Attorneys for Appellant

Copy of the foregoing mailed this 13th day of February, 1975, to:

J. William Brammer, Jr., Esquire
DeCONCINI, McDONALD & BRAMMER, P.C.
901 Lawyers Title Building
199 North Stone Avenue
Tucson, Arizona 85701
Attorneys for Appellee